

Detroit East, Inc. and Yvette Smith, Petitioner and Local 1640, Michigan Council 25, American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO. Case 7-RD-3494

April 30, 2007

ORDER REMANDING PROCEEDING

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

The National Labor Relations Board, by a three member panel, has considered an objection to an election held on August 18, 2006,¹ and the hearing officer's report, recommending disposition of it. On September 7, the Union filed an objection to the conduct of an election² in a unit of the Employer's clinical staff, clerical, and maintenance employees. The hearing officer recommended overruling the objection, which alleges that the Employer improperly used its attorney's paralegal as its election observer. The hearing officer found that the Union waived this objection by failing to raise it during the preelection conference. As explained below, we see the case differently, and find that a remand is required.

Relevant Facts

The credited testimony establishes that roughly 15 to 30 minutes before the polls opened, employee Elaine Crenshaw, the Union's designated election observer, attended a preelection conference at the voting facility. Also present were the Board agent, representatives of the Employer, the Employer's designated election observer, Maurine Payne, and union representatives, including the Union's consultant, Rogelio Gonzalez. During this conference, brief introductions were made, which included the names of the participants and their roles in the election.

Upon arriving at the meeting, Crenshaw recognized Payne from two prior unfair labor practice settlement meetings between the Union and the Employer. Crenshaw was present at those meetings as the Union's chapter chair, and Payne was present as the paralegal for the Employer's attorney.

During the preelection conference, Payne crossed out the word "employee" on the form for the Employer's designation of observer, inserted the word "agent" in its place, and returned the form to the Board agent. Shortly thereafter, the Board agent asked Payne, out of the hearing of the others present, about her role as the Employer's agent. Payne responded that she was a paralegal working for the Employer's attorney. After calling her supervisor at the Regional Office, the Board agent told Payne that the par-

ties might have a problem with her sitting as an observer. Payne told the Board agent that she had been instructed by the Employer to sit as an observer unless she was disqualified and, accordingly, she wanted to proceed as the Employer's observer. At no time prior to the election did the Board agent disclose or discuss Payne's status with the other parties.

The credited testimony further establishes that, during the conference, employee Crenshaw informed Gonzalez and the other union representatives of her understanding that Payne was the Employer's "attorney."³ Gonzalez did not, however, say anything about this to the Board agent. At the conclusion of the election, the Board agent announced to all of the parties that Payne was the paralegal for the Employer. At that time, Gonzales notified the Board agent that the Union objected to the Employer's use of Payne as its election observer.

The record also includes certain testimony by Crenshaw that is not discussed in the hearing officer's report. According to that testimony, Crenshaw approached the Board agent during the preelection conference, stated that Payne was the Employer's attorney, and asked her why Payne was present. Crenshaw further testified that, in response to these comments, the Board agent called her supervisor at the Regional Office and pulled Payne aside to speak with her.

The Hearing Officer's Findings

The hearing officer found that, during the preelection conference, employee Crenshaw was aware that Payne was the paralegal for the Employer's attorney. The hearing officer also found that, although Crenshaw notified the Union's consultant, Gonzalez, about this matter during the preelection conference, Gonzalez did not raise an objection to the Employer's use of Payne as its observer until after the election. Thus, the hearing officer recommended overruling the objection, finding that the Union waived it by failing to raise it during the preelection conference.

In its exceptions, the Union relies on the part of Crenshaw's testimony not addressed by the hearing officer, and argues that this testimony shows that the Union timely raised its objection during the preelection conference. As discussed below, we find that the Union's exceptions raise an issue that necessitates a remand.

Discussion

It is well established that if the objecting party does not raise the alleged status of an election observer during the

³ The hearing officer found that Crenshaw referred to Payne as an attorney because Crenshaw did not understand the difference between an attorney and a paralegal. There are no exceptions to this finding.

¹ Unless otherwise indicated, all dates refer to 2006.

² The tally of ballots shows 17 votes for the Union, 19 votes against the Union, and no challenged ballots.

preelection conference the objection is waived.⁴ In our view, Crenshaw's testimony, if credited, would be at odds with the hearing officer's finding that the Union waived its objection by failing to raise it during the preelection conference. As set forth above, Crenshaw testified that she informed the Board agent that Payne was the Employer's attorney and asked her why Payne was present. Crenshaw further testified that, in response, the Board agent called her supervisor at the Regional Office and thereafter pulled Payne aside. We find that this testimony, if credited, would sufficiently establish that the Union raised the status of the Employer's observer during the preelection conference.

As noted above, however, the hearing officer did not mention that portion of Crenshaw's testimony in her report, and thus did not rule on its credibility. Moreover, because the hearing officer credited some portions of Crenshaw's testimony and discredited other portions,⁵ it is not clear whether the hearing officer intended to make an implicit credibility finding with respect to the unmentioned portion of Crenshaw's testimony. Therefore, as the waiver issue may be resolved only by a determination of whether Crenshaw's testimony on this point is credible, we find that it is necessary to remand this case to the hearing officer to make the appropriate credibility findings.

In remanding this case, we note that the Board agent erred by failing to notify all of the parties, together and at the appropriate time, of Payne's status as the paralegal of the Employer's attorney. In *Browning-Ferris Industries of California*, 327 NLRB 704 (1999), the Board articulated a procedure for Board agents to follow once the agent is made aware of a party's intent to use a potentially objectionable observer. Under this procedure, the Board agent must advise all parties of the potential adverse consequences of using an objectionable observer under applicable case law, i.e., that if it is determined that the party's use of the objectionable observer was not reasonable under the circumstances, the election could be set aside. *Id.* But here, once the Board agent became aware of Payne's status, the Board agent discreetly pulled Payne away from the parties to discuss the issue in

private instead of openly discussing with all of the parties the potential adverse consequences.⁶

We do not, however, rely on the Board agent's conduct as a basis for setting aside the election. Despite the agent's failure to follow the procedure set forth in *Browning-Ferris*, the Union was not deprived of the opportunity to raise Payne's status prior to the election, as the record shows that Crenshaw and the union officials were aware of Payne's status during the preelection conference. Thus, the sole issue on remand is whether Crenshaw's testimony, discussed above, is credible.

Our dissenting colleague contends that Crenshaw's testimony, even if credited, is insufficient to establish that the Union timely raised its objection during the preelection conference. According to our colleague, because neither Gonzalez nor the Union's representatives said anything to the Board agent after Crenshaw advised them of Payne's status, a finding of a waiver is warranted, notwithstanding Crenshaw's alleged statements to the Board agent. We disagree.

It is well settled that election observers act as agents of the parties that they represent at the election. See, e.g., *Brinks Inc.*, 331 NLRB 46 (2000) (finding that employee "engaged in the electioneering while acting as the union observer, and he was thus an *agent* of the Union at this time of misconduct") (emphasis added); *Monfort, Inc.*, 318 NLRB 209 (1995) ("The observers not only represent their *principals* but also assist in the conduct of the election.") (emphasis added).

This rule must be applied consistently: if an observer's actions are imputable to its principal when the observer *violates* Board rules, the observer's actions are also imputable to its principal when the observer acts in conformity with Board rules. To that end, employee Crenshaw, who was present at the preelection conference solely in her capacity as the Union's election observer, acted within the scope of her duties when she purportedly brought Payne's status to the attention of the Board agent. That Gonzalez, as the Union's consultant, had authority to speak on behalf of the Union does not mean that Crenshaw did not also have authority to speak in this regard.⁷

Our colleague also contends that Crenshaw's testimony, if credited, does not constitute an objection, but

⁴ See, e.g., *Liquid Transporters, Inc.*, 336 NLRB 420 (2001); *Monarch Building Supply*, 276 NLRB 116 (1985); and *St. Joseph Riverside Hospital*, 224 NLRB 721 (1976).

⁵ The hearing officer discredited Crenshaw's testimony that the Respondent's employees were aware of Payne's role as a paralegal. The hearing officer credited Crenshaw's testimony that she informed Gonzalez of Payne's role.

⁶ See, e.g., *Peabody Engineering Co.*, 95 NLRB 952, 953 (1951) (employer's use of its attorney as its election observer was not reasonable under the circumstances, and warranted setting aside the election).

⁷ Indeed, Gonzalez' silence on this matter during the preelection conference may simply reflect his recognition of the fact that once Crenshaw—as the one who had knowledge of Payne's status as the Employer's paralegal—raised the matter with the Board agent, nothing more needed to be said.

that it was merely a question why the Employer's attorney was present. We disagree. A party's objection to another party's use of an observer is preserved if, at the time of the preelection conference, the objecting party raises the status of the objectionable observer. See, e.g., *Liquid Transporters, Inc.*, 336 NLRB 420 (2001) ("It is well-established Board law . . . that an employer must raise the alleged supervisory status of a union's election observer at the time of the preelection conference.")⁸ The Board does not require a party to fully articulate the nature of its objection at that time. Here, Crenshaw testified that she told the agent that Payne was the Employer's attorney and asked the Board agent why Payne was present. Those statements, if credited, are sufficient to establish that the Union raised Payne's status and, more specifically, that the Union conveyed that it had a problem with Payne's presence as the Employer's observer. Moreover, the Board agent's asserted response, namely calling her supervisor for further instruction, would, if proved, further confirm that the Union raised the objectionable status of Payne both in a timely manner and with sufficient specificity.

Accordingly, we shall remand this case to the hearing officer to further consider the waiver issue by determining whether the applicable portion of Crenshaw's testimony is credible.

ORDER

IT IS ORDERED that this proceeding is remanded to the hearing officer for consideration of the disputed evidence and the issuance of a supplemental report including credibility determinations, findings of fact, and recommendations. Following the issuance of the hearing officer's supplemental report, the provisions of Section 102.69(i)(2) shall apply.

CHAIRMAN BATTISTA, dissenting.

The majority finds that a remand is necessary. In my colleagues' view, employee Elaine Crenshaw's testimony, if credited, would establish that the Union did not waive its objection to the Employer's use of Maurine Payne as its observer. Contrary to my colleagues, I find that Crenshaw's testimony, even if credited, is insufficient to establish that the Union raised this objection during the preelection conference. Accordingly, I agree with the hearing officer that the Union waived this objection.

⁸ Member Walsh observes that in *Liquid Transporters*, supra, the Board spoke of the obligations of employers, not parties. The Board was careful not to place the same obligation on unions, who may be in no position, at the time of the preelection conference, to address the question of whether a low-level supervisor chosen to serve as the employer's observer is actually a 2(11) supervisor. The distinction is not relevant in the present case, however, because the record establishes that the Union knew that Payne was an agent of the Employer.

The relevant facts are that union observer Crenshaw, Union Agent Rogelio Gonzalez, and two other union officials attended a preelection conference along with, among others, the Board agent and the Employer's observer Payne. During this conference, Crenshaw informed Gonzalez and the other union officials that Payne was the Employer's "attorney." Notwithstanding this notice, neither Gonzalez nor any other union official in attendance raised an objection to the Board agent. Instead, they allowed the election to proceed, with Payne serving as the Employer's observer. Only after the polls closed, and the parties had reassembled for the tally of ballots, did the Union, through Gonzalez, object to the Employer's designation of Payne as its election observer.

In remanding this case, my colleagues focus exclusively on the conduct of Crenshaw. They ignore the role played by Gonzalez and the two other union representatives. Crenshaw was the observer for the Union, but Gonzalez and the others were the Union's representatives. Indeed, it was Gonzalez who belatedly raised the objection based on the Employer's use of Payne as its observer. Significantly, Gonzalez and the other union representatives were specifically told by Crenshaw, at the preelection conference, that Payne was the Employer's attorney. Despite this, none of these representatives said anything at all about this to the Board agent. Gonzalez did so only after the election was over. This failure to act by union representatives was a waiver on the part of the Union.

My colleagues say that Crenshaw, as a union observer, was a union agent. A party's observer is present to observe matters *during the election*, not to be an agent of the party at the *preelection conference*.¹ Further, even assuming arguendo that an observer is an agent for purposes of the preelection conference, Crenshaw was simply one of four union representatives at that conference. Indeed, it was agent Gonzalez who was the principal union representative. He signed the requisite forms for the Union at the election, and he was the one who belatedly raised the issue of Payne's status. In these circumstances, I would conclude that the preelection silence of Gonzalez and the two other union representatives on the issue of Payne's status was a waiver of the issue by the Union.

Finally, even if Crenshaw was a principal union representative for purposes of the preelection conference, she did not object to Payne's acting as an observer. Although Crenshaw did mention the matter to the Board

¹ See generally *United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988) (union's selection of employee as its election observer does not render the employee a general agent of the union).

agent, she did not raise it as an objection. Even if she is credited, she merely asked why the Employer's "attorney" Payne was present. Clearly, a question is not an objection. Concededly, the Board does not require any magic words to raise the issue. But, Crenshaw did not say, or even imply, that Payne should not be an observer.

It may well be that the Board agent saw the problem sua sponte even if Crenshaw was not raising it. She called the Board's office and spoke to Payne. However,

this action by the Board agent, acting sua sponte, does not establish that Crenshaw raised an objection.

Accordingly, I find there is no need for a remand. Even if Crenshaw's testimony is credited, the record demonstrates that the Union waived its objection.²

² No party has raised the issue referred to by Member Walsh in fn. 8 of the majority opinion, and thus the issue has not been briefed. Accordingly, I would not pass on it.